

This Department of Labor proposal would reverse Trump-era regulations which state that certain retirement investments should be chosen "based solely on pecuniary factors." The proposal would instead expressly permit ESG considerations when selecting investments or exercising shareholder voting rights on behalf of ERISA (Employee Retirement Income Security Act) plan participants.

#### Nasdaq Board Diversity Listing Rules – 5605(f) and 5606

In August 2021, Nasdaq's proposal to amend its listing standards to require board diversity disclosures for listed companies was approved. The standards that are now required include reporting on board-level diversity statistics (reported annually) and having either a minimum of two diverse board members or a public disclosure of why they have not met the minimum.

#### GRI Standards (in force from 1 January 2023)

The GRI Standards are an easy-to-use modular set of standards related to many ESG topics: human rights, environmental due diligence, etc. The GRI Standards can apply to public or private organizations of any size.

#### SASB Standards (in force since 2018)

SASB's standards are a set of ESG-related issues that are relevant to financial performance for 77 industries and help companies disclose sustainability-related information to investors. SASB is a non-profit that was founded in 2011 to establish a common language about finance and sustainability for investors and businesses.

#### **The Asia-Pacific Region**

ESG regulation across the APAC region is fragmented, with no consistent taxonomy and lax adoption of the ESG frameworks in use across other regions. Despite this fragmentation and inconsistency, ESG is high on business leaders' agendas. Over 90% of respondents to a [recent Baker McKenzie study in the region](#) stated that ESG is "at least part of the discussion" during decision-making on M&A.

#### Establishing taxonomy systems

China is cooperating with the EU to align green investment taxonomies across the two markets, aiming to create a jointly recognized classification system for environmental credentials.

In November 2021, the ASEAN (Association of Southeast Asian Nations) released the first version of its taxonomy for sustainable finance, which will act as a framework for partnership and discussions between the public (government) and private sectors.

Each of the regulations described above introduces potential risk, and often demands significant effort and resource to address, but can be simplified with strategies for collecting, storing, organizing, and analyzing data as efficiently and consistently as possible.

### **[Chapter 3] Facilitating ESG compliance with technology – Omitted**

### **[Chapter 4] ESG technology solutions in action - Omitted**

### **[Chapter 5] Start managing ESG requirements proactively and efficiently – omitted**

## Applicant Details

First Name **Andre**  
 Last Name **Tucker**  
 Citizenship Status **U. S. Citizen**  
 Email Address [tuckerar@tjssl.edu](mailto:tuckerar@tjssl.edu)  
 Address

### Address

Street  
**1045 E Street**  
 City  
**San Diego**  
 State/Territory  
**California**  
 Zip  
**92101**  
 Country  
**United States**

Contact Phone Number **614-446-5442**

## Applicant Education

BA/BS From **Clark Atlanta University**  
 Date of BA/BS **May 2017**  
 JD/LLB From **Thomas Jefferson School of Law**  
<http://www.tjssl.edu>  
 Date of JD/LLB **May 13, 2023**  
 LLM From **Loyola Law School**  
 Date of LLM **May 1, 2024**  
 Class Rank **33%**  
 Does the law school have a Law Review/Journal? **Yes**  
 Law Review/Journal **No**  
 Moot Court Experience **Yes**  
 Moot Court Name(s) **Moot Court Honor Society**

## Bar Admission

Admission(s) **Alaska**

### Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

### Specialized Work Experience

### Professional Organization

Organizations	President, Student Bar Association
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### Recommenders

Rierson, Sandra  
srierson@tjssl.edu

Lawton, Dan  
dlawton@klinedinstlaw.com

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

André Tucker  
 2352 Hilliard Rome Road  
 Hilliard, Ohio 43026  
[Andre.tucker@llm.edu](mailto:Andre.tucker@llm.edu)

July 28, 2023

**The Honorable Julien Xavier Neal**  
 United States District Court for the District of New Jersey  
 Martin Luther King, Jr. Federal Building and United States Courthouse  
 50 Walnut Street Newark, NJ 07102

Dear Judge Neal:

My name is André Tucker, and I am extremely interested in continuing my career as your Law Clerk. Therefore, I am submitting this letter to apply for a clerkship with your chambers for the upcoming term. As an accountant and financial analyst, I have obtained more than 13 years of experience in the corporate sector. With that said, substantial exposure to the justice system throughout my life compelled me to expand my career in the law. For instance, during my sophomore year in high-school, I lobbied my legislators to allocate additional funding to my local school district. Through this effort and others, I was named Pennsylvania's *Youth of the Year* and featured on PBS's broadcast, "It takes A Village to Raise a Child". (See, PBS Special snippet <https://youtu.be/4Qdp4iLw1M4>). Unfortunately, two years later my life changed forever. At the age of 17, I began the process of petitioning the Court to obtain sole guardianship of my two younger siblings, following our mother's death in a vehicular accident.

Upon earning a scholarship, the following year, I relocated to Atlanta, Georgia, with two minors, to attend Clark Atlanta University ("CAU"). It was a challenge for me to be a full-time parent and student simultaneously, so I withdrew from CAU temporarily and accepted a position with Verizon Communications. During my time at Verizon, I received the VZ Excellence Award for the creation and implementation of the Hurricane Katrina Rebuilding Phase Project, which assisted more than 500 displaced New Orleans residents with food, shelter, and clothing.

Prior to pursuing a juris doctorate at Thomas Jefferson School of Law, I earned an MBA as well as a Master of Legal Studies degree from Washington University in St. Louis School of Law ("WashU"). While at WashU, I enrolled in the Nonprofit Planning, Drafting, and Negotiation course. The course required that the students create a nonprofit organization. The nonprofit that I

developed, which was called Steel City Defenders, was geared towards alleviating poverty, providing equitable access, and addressing civil and criminal justice issues in my community. After earning the highest grade in the course and upon recommendation of my professor, I decided to convert the fictitious idea into a registered not-for-profit organization in the Commonwealth of Pennsylvania.

The last two years as a JD candidate have been nothing less than eventful. The student body selected me as “Leader of the Year” and subsequently their Student Bar Association President. In addition, during the Fall 2022 semester, I earned the title of “Best Oralist” and Best Legal Writer”. Through my law school’s Moot Court Honor Society, I had the privilege to argue the paramount *Moore v. Harper* election law case at the Annual Constitution Day celebration in San Diego. Additionally, I have had the honor to be an extern for two exceptional U.S. District Court Judges. As a Judicial Extern I was able to work directly with six law clerks where I drafted opinions and orders, conducted significant research, and provided much analysis on various issues. My experience as a LexisNexis associate provided opportunities for me to lead training in chambers as well. I am most proud of, however, earning the Honorable Earl B. Gilliam Scholarship. The late Judge Gilliam was an advocate for racial equality, women’s rights, and youth education. So am I.

Your Honor, I firmly believe that I have the experience, skill set, and work ethic to be an excellent Law Clerk. Receipt of several CALI Academic Awards for Federal Evidence, Legal Writing, and Appellant Advocacy; coupled with my experience as the Federal Civil Procedure and Federal Evidence Teaching Assistant further illustrates that I will be ready to add-value in chambers day one. Furthermore, I have gained sufficient practical experience during my time as a civil law clerk and Criminal Law Fellow with the San Francisco Public Defender’s Office.

If your schedule permits, I would be honored to have the chance to speak with you directly to discuss my qualifications and interest in greater detail.

Thank you in advance for your time and consideration,

Respectfully,

/s/ André Tucker  
André Tucker  
614-446-5442

## ANDRÉ R. TUCKER

[amdrertucker@gmail.com](mailto:amdrertucker@gmail.com)

### UNIVERSITY DEGREES

**LL.M, Civil Litigation & Trial Advocacy** – Loyola Law School, Los Angeles, California (May 24')

**Juris Doctor** – Thomas Jefferson School of Law, San Diego, California

**Master of Business Administration** – Ohio Christian University, Circleville, Ohio

**Master of Legal Studies** – Washington University School of Law, St. Louis, Missouri

**Bachelor of Arts, Accounting** – Clark Atlanta University, Atlanta, Georgia (OCU)

### PROFESSIONAL EXPERIENCE

**United States District Court - Southern District of Ohio** **January 2023 – May 2023**  
**Judicial Extern, Honorable Algenon L. Marbley, Chief** **Columbus, OH**

- Drafts court orders and opinions to resolve issues relating to preliminary injunctions, compassionate release, and corporate intervening.
- Performs ad hoc analysis and briefing pertaining to a wide variety of topics, including but not limited to; the Trafficking Victims Protection Reauthorization Act, Telecommunications Act of 1996, Equal Employment Opportunity Commission, and juror misconduct.
- Observed all aspects of civil and criminal trials.

**United States District Court - Southern District of California** **Summer 2022**  
**Judicial Extern, Honorable John A. Houston** **San Diego, CA**

- Drafted court orders regarding various topics, including but not limited to, compassionate release, proceedings in Forma Pauperis, and sovereign immunity.
- Observed Magistrate Judge's settlement conferences.

**San Francisco Public Defender** **May 2021 – May 2022**  
**Certified Fellow, Pretrial Release Unit** **San Francisco, CA**

- Interviewed clients while in custody to prepare lead counsel for first appearances.
- Drafted bond motions for clients.
- Updated and maintained agency's master file for all clients detained during the weekends.

**Vaco Consulting** **2019**  
**Law Clerk & Accounting Associate - Contractor** **Columbus, OH**

- Completed a multi-faceted intensive internal audit project, involving Accounts Payable, exceeding expectations.
- Researched case law and prepared various documented support to be used in corporate litigation.
- Audited and revised Accounts Receivables processes and procedures.

**Pribanic & Pribanic, LLC** **Summer 2018**  
**Civil Law Clerkship** **Pittsburgh, PA**

- Analyzed and edited civil complaints relating to medical malpractice, worker's compensation, and motor vehicle accidents.
- Researched pertinent case law and precedent in the areas of wrongful death, vicarious liability, product liability, and fracking injuries.
- Prepared critical exhibits to be used for trial and mediation hearing.

- Conducted extensive research and comprehensive analysis for a leading case involving liability and Pennsylvania's Rails to Trails, concluding with a detailed written report.

**Franklin County Public Defender  
Criminal Law Clerkship**

**May 2018  
Columbus, OH**

- Advocated for and sought resources for indigent defendants in the Franklin County criminal justice system.
- Interviewed detainees held in Franklin County jail in preparation for arraignment and bail proceedings.
- Set up files for court appearances and assisted lead clerks during court proceedings.

**Advanced Drainage Systems  
Accounting Associate**

**2016 - 2017  
Hilliard, Ohio**

- Audited 10% of all employees purchase card statements for SOX compliance.
- Developed a reporting template that is used by all Plant Accountants to illustrate both policy violations and problem areas pertaining to invoice processing and coding.
- Liaison between the corporation and the lessor of all 82 facilities worldwide.
- Reviewed and maintained contractual agreements and payments log for all corporate consultants and property owners of leased space.
- Performed month-end/year-end close, financial statement preparation and budget variances, while assisting management to resolve variances.

**The Hope Foundation Northeast  
Founder / Director**

**2010 - Current  
Pittsburgh, PA**

- Created and developed various programming for the citizens of Allegheny County, Pennsylvania that directly impacted lives.
- Solicited and raised \$625,000 for educational programs, through grant writing initiatives and presentations.
- Sponsored monthly Town Hall meetings educating community members of their rights, as it related to voting, education reform, criminal justice reform, and parental obligations.
- Responsible for overseeing daily operations inclusive of resolving all accounting issues and maintenance of internal controls and monthly financial close.
- Conducts annual Historically Black College Tour for middle school youth.

**Metlife  
Controller's Assistant - Budget & Expense**

**2007 - 2010  
Tampa, FL**

- Lead team of six in the Budget Cycle; formulating assumptions, reviewing accounting procedures, and evaluating prior year activity.
- Responsible for Monthly/Quarterly Close Process which entailed, providing analytics for significant variances, research questionable charges.

**Verizon Communications  
Financial Analyst - Audit Lead**

**2003 - 2007  
Dallas, TX / Tampa, FL**

- Managed team of eleven to address Internal Audit's Detailed Observations and Recommendations Matrix (DORM), relating to capital and expenditure issues as well as Corporate Policy Compliance.
- Developed sampling test processes and conducted quarterly internal audits on Vendor agreements and related invoices, which includes wire transactions exceeding \$100K.

## AWARDS & ACTIVITIES

2023 Loyola Law School Merit Scholar  
 2022 Scholar – Honorable Earl B. Gilliam Award  
 President, Student Bar Association 2022-23 – Thomas Jefferson School of Law (*resigned*)  
 CALI Highest Grade Award, Fall 2022 – *Appellate Advocacy* - Thomas Jefferson School of Law  
 “Top Oralist” Intra-School Competition 2022 - Moot Court Honor Society  
 Head Ambassador – BARBRI 2022-2023  
 CALI Highest Grade Award, Spring 2022 – *Legal Writing II* - Thomas Jefferson School of Law  
 Jeffersonian Medal - Highest Grade, Spring 2022 – *Trial Practice* - Thomas Jefferson School of Law  
 Thomas Jefferson School of Law’s “Leader of the Year 2021-22”  
 CALI Highest Grade Award Summer 2021 – *Federal Evidence* - Thomas Jefferson School of Law  
 Distinguished Academic Honor Roll - Thomas Jefferson School of Law  
 LexisNexis Associate 2021-22  
 President, International Cannabis Bar Association (INCBA) – Thomas Jefferson School of Law  
 Jeffersonian Medal - Highest Grade, Spring 2021 – *Criminal Trial Procedure* - Thomas Jefferson  
 IL Representative Student Bar Association - Thomas Jefferson School of Law  
 1<sup>st</sup> Place, Business Law Competition - Washington University in St. Louis School of Law  
 Finalist, The Harry S. Truman Scholar Program  
 Pittsburgh Pirates Community Champion  
 Chair, MetLife Communication Council  
 Semi-Finalist – NBC’s The Apprentice, Season 2  
 Verizon Excellence Award Winner  
 University Ambassador - Clark Atlanta University  
 Vice-President, INROADS Association Board  
 Treasurer, Alpha Phi Alpha Fraternity, Incorporated  
 President, School of Business – Clark Atlanta University  
 Chairman, Student Government House of Delegates – Clark Atlanta University  
 President, Student Government Association – Clark Atlanta University

## Unofficial Transcript

Thomas Jefferson School of Law

Office of the Registrar

701 B Street Suite 110

San Diego, CA 92101

**Name:** Tucker, Andre R

Curriculum:	Degree Awarded	Date Granted
LAW	No Degree Awarded Yet	

**Honors:** **Cumulative GPA:** 3.07

**Previous Institution:**

### 2021 Spring CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 099	Legal Writing I	Online	3.5	3.00	10.50
CALS 103	Civil Procedure	Online	3.8	5.00	19.00
CALS 105	Criminal Law	Online	1.2	3.00	3.60
CALS 119	Learning Skills	Online	CR	1.00	0.00
CALS 140	Professional Respons	Online	3.3	3.00	9.90
CALS 571	Intro Criminal Trial	Online	H	1.00	0.00

### Awards

Honor Roll

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
<b>Term</b>	14.00	16.00	16.00	14.00	0.00	43.00	3.07
<b>Overall</b>	14.00	16.00	16.00	14.00	0.00	43.00	3.07

### 2021 Spring Inter CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 126	Sex Crimes	Online	CR	1.00	0.00
CALS 423	Intro to Mediation	Online	CR	1.00	0.00
CALS 543	ADR in Crim Context	Online	CR	1.00	0.00

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	0.00	3.00	3.00	0.00	0.00	0.00	0.00
Overall	14.00	19.00	19.00	14.00	0.00	43.00	3.07

### 2021 Summer CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 106	Criminal Procedure	Online	3.3	3.00	9.90
CALS 138	Evidence	Online	4.3	4.00	17.20

### Awards

Dist. Honor Roll

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	7.00	7.00	7.00	7.00	0.00	27.10	3.87
Overall	21.00	26.00	26.00	21.00	0.00	70.10	3.34

### 2021 Fall CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 101	Contracts	Lecture	2.2	5.00	11.00
CALS 111	Torts	Lecture	2.1	5.00	10.50
CALS 145	Property Law	Lecture	2.6	5.00	13.00

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	15.00	15.00	15.00	15.00	0.00	34.50	2.30
Overall	36.00	41.00	41.00	36.00	0.00	104.60	2.91

## 2022 Spring CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 115	Business Association	Lecture	2.4	3.00	7.20
CALS 170	Trial Practice	Lecture	4.0	3.00	12.00
CALS 199	Legal Writing II	Lecture	4.0	3.00	12.00
CALS 202	California Civ Pro	Lecture	3.8	2.00	7.60
CALS 225	California Evidence	Lecture	2.6	2.00	5.20
CALS 697	Externship I	Externship	CR	2.00	0.00

## Awards

Honor Roll

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	13.00	15.00	15.00	13.00	0.00	44.00	3.39
Overall	49.00	56.00	56.00	49.00	0.00	148.60	3.03

## 2022 Summer CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 166	Remedies	Lecture	2.7	3.00	8.10
CALS 167	Community Property	Online	3.5	2.00	7.00
CALS 548	Intra School Moot Ct	Online	CR	1.00	0.00
CALS 702	Judicial Seminar	Externship	CR	2.00	0.00

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	5.00	8.00	8.00	5.00	0.00	15.10	3.02
Overall	54.00	64.00	64.00	54.00	0.00	163.70	3.03

## 2022 Fall CALS

Thomas Jefferson School of Law

Course	Title	Sub Type	Grade	Credits	Quality Points
CALS 134	Appellate Advocacy	Lecture	4.0	2.00	8.00
CALS 135	Constitutional Law I	Lecture	3.8	3.00	11.40
CALS 171	Wills & Trusts	Lecture	2.8	3.00	8.40
CALS 525	Solo Practice	Lecture	CR	2.00	0.00
CALS 533	MBE Mastery	Lecture	2.6	3.00	7.80

	Attempted Credit	Earned Credits	Total Credits	GPA Credits	Transfer Credits	Quality Points	GPA
Term	11.00	13.00	13.00	11.00	0.00	35.60	3.24
Overall	65.00	77.00	77.00	65.00	0.00	199.30	3.07

Test Scores

THOMAS JEFFERSON  
SCHOOL OF LAW  
SAN DIEGO • CALIFORNIA

April 4, 2023

To Whom it May Concern:

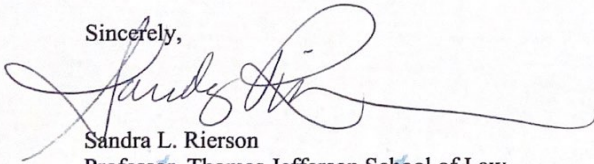
I am submitting this recommendation on behalf of Mr. Andre Tucker. During his first semester of law school, Mr. Tucker was my student in Civil Procedure, a 5-unit course covering the fundamentals of federal civil procedure. Mr. Tucker earned a grade of A-/3.8 in this class (top 10%). He also organized a symposium sponsored by LexisNexis and the Southern California Law Student Cannabis Advocates, during which my co-author and I presented a paper regarding the Wilmington Massacre and Coup of 1898 and the need for restorative justice. I am delighted to give Mr. Tucker my highest recommendation.

As his transcript reflects, Mr. Tucker is a talented and dedicated law student. Even in an exclusively on-line environment, Mr. Tucker was a reliably engaged and thoughtful participant in class discussions. He mastered difficult material and demonstrated his proficiency in both a midterm and final exam. Mr. Tucker has excelled as a law student, and he will continue to excel as a lawyer.

Mr. Tucker also has an exemplary attitude. He is a natural leader. Even during a global pandemic, he quickly established close connections with other members of his 1L class and became their Student Bar Association representative. Mr. Tucker never hesitates to take the initiative to address the problems and injustice that he sees in the world around him. As his resume reflects, he consistently puts his considerable talents to good use in the service of others, and I am confident that he will continue to do so as a lawyer.

Please contact me if you have any questions regarding the above.

Sincerely,



Sandra L. Rierson  
Professor, Thomas Jefferson School of Law  
Visiting Associate Professor, California Western School of Law



Dan Lawton  
Shareholder  
Certified Specialist, Appellate Law  
501 West Broadway, Suite 600  
San Diego, California 92101  
(619) 488-8855  
(619) 238-8707 Fax  
[dlawton@klinedinstlaw.com](mailto:dlawton@klinedinstlaw.com)

March 14, 2023

**VIA OSCAR**

Hon. Wilma Lewis  
U.S. District Judge  
District Court of the Virgin Islands  
Ron de Lugo Federal Building  
5500 Veterans Drive, Rm 310  
St. Thomas, VI 00802

**Re: *Andre Tucker***

Your Honor:

I write concerning my former student Andre Tucker, an applicant for a judicial clerkship in your chambers. I hope this letter can be helpful to you in evaluating Andre's fitness and qualifications for service as a law clerk to you.

I first met Andre in August 2022, on the first day of my Appellate Advocacy class, which I have taught at Thomas Jefferson School of Law since 2001. I saw and interacted with Andre regularly and at least once a week after that and through December 2022, when the semester ended. My Appellate Advocacy class, the only one offered at the law school, offers a small group of students a rigorous environment in which they must master the facts of an actual case once litigated in the California courts, formulate arguments in support of a reversal of the judgment entered in that case, draft two rounds of appellants' opening briefs (both graded), and, at the end of the semester, deliver an oral argument concerning the case to a panel of "Justices" (one actual Judge and two experienced appellate attorneys). In the fall 2022 semester class enrollment was twelve, of which Andre was one.

The one-on-one time in the class included writing conferences during which I met with each student in order to go over the first draft of his or her

Los Angeles • Sacramento • San Diego • Santa Ana • Seattle

Hon. Wilma Lewis

March 14, 2023

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opening brief, offer constructive criticism, and explain marginal comments I had made concerning their brief-writing.

I estimate that the number of Appellate Advocacy students I have taught over the years exceeds 160. Of that number, I can easily say that Andre Tucker was head-and-shoulders the best of all of them. He was the best brief-writer, the best oral advocate, the best listener, and the best adopter of constructive criticism and teaching of all the students I have ever had. At all times and from the first moment of the first class he demonstrated an honest enthusiasm for the material, the challenge of the class, and mastery of the science and art of brief-writing and arguing to an appellate panel.

By coincidence, during the semester, I gave an oral argument at the Ninth Circuit in one of my cases. Afterward, I felt I had not performed well. I thought, “I supposedly teach these students. But apparently I need some learning myself. Why not show the students the video and let them offer some criticism of my work?” And so it came to pass. I think it must have been awkward for some students, when asked to offer criticism of my work, to say it out loud. Andre was unafraid, however, and the criticism he gave was right on. The student taught the teacher. That was a first for me. I thought it said a lot about both Andre’s knowledge of a subject matter he was still absorbing and his confidence in himself in the presence of peers and his law professor.

Long ago, my first job after law school was a judicial clerkship, with Judge Thomas Tang of the Ninth Circuit. It was the best job I ever had in law to this day. From observing the other law clerks and reflecting on my own work, I felt that these words were the ones that described the very best law clerks I saw in Judge Tang’s chambers and in other Judges’ chambers (which we would visit from time to time): smart, industrious, aerobic listeners, loved the law, team players, positive attitude in a work environment that can feel cloistered and isolated, passionate about justice in every case, passionate about the law and learning about it in every case, deeply committed to the mission of the court, humble, problem-solvers, knowing the line that divides the zones of when to figure something out on one’s own vs. when to go ask for help, efficient, transparent, genuine,

Hon. Wilma Lewis  
March 14, 2023  
Page 3

likeable, good sense of humor, taking the work seriously without taking oneself too seriously.

All of those words and qualities describe Andre Tucker. Were I a Judge he would be my first choice for a law clerk position. Were he applying for a job at our law firm he would have a job offer from us at my recommendation on the same day he applied.

I can't recommend Andre Tucker highly enough for the role of law clerk in your chambers. I have the highest esteem for his brains, acumen, virtues, professional demeanor and bearing, likeability, and personal qualities.

I recommend you hire him before somebody else does.

Should you have any questions about Andre, please contact me.

Thank you for your kind attention to this matter.

Yours very truly,

KLINEDINST PC

s/Dan Lawton  
DAN LAWTON

DL

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**V.**

**LANCE K. POULSEN,**

**Defendant.**

• • • • •

**Case No. 2:06-CR-129(001)**

**CHIEF JUDGE ALGENON L. MARBLEY**

## OPINION & ORDER

This matter comes before this Court on Lance K. Poulsen’s Motion for Early Termination of Supervised Release. (ECF No. 1459). Poulsen asks this Court to terminate his term of supervised release early, on account of his exceptionally good behavior and in the interest of justice. (*Id.*). The Government and Poulsen’s Probation Officer, U.S.P.O. Brynn Dawsy, oppose the motion. (ECF No. 1460 at 7). For the reasons set forth herein, the motion is **DENIED**. (ECF No. 1459).

## I. BACKGROUND

On March 26, 2008, in a separate case, Poulsen was found guilty by a jury for witness tampering, and this Court sentenced him to 120 months imprisonment and 3 years of supervised release. *See United States v. Poulsen*, No. 2:07-cr-209 (ECF Nos. 109, 139). Additionally, on October 31, 2008, in this matter, Poulsen was found guilty by a jury on several counts of money laundering, conspiracy, and securities fraud. (ECF No. 857). Poulsen was sentenced to 360 months imprisonment. (ECF No. 1009), to be served concurrently with his previous sentence.

On July 23, 2020, Poulsen filed a Motion for Compassionate Release, asking for his sentence to be reduced to time served and to be released on supervised release subject to a period of home confinement, due to his age and vulnerability to the COVID-19 virus. (ECF No. 1429). On September 21, 2020, this Court granted Poulsen's Motion for Compassionate Relief finding

that the totality of Poulsen’s circumstances—his age, underlying health conditions, the fact that he contracted COVID-19 at that time, the non-violent nature of his offenses, and the fact that he had served nearly half of his thirty-year sentence—constituted compelling reasons for his release in light of the COVID-19 pandemic. (ECF No. 1435).

Poulsen was released from imprisonment and began his period of three years of supervised release on September 22, 2020, subject to the same terms and conditions originally imposed. On August 18, 2022, Poulsen filed a Motion to Terminate Supervised Release. (ECF No. 1459). Poulsen argues that over the twenty-two months since his release from confinement, he “has had a spotless record.” (*Id.* at 5). Poulsen further argues that since his release he has exhibited “exceptional behavior . . . a humble and positive approach, becoming ‘someone with purpose.’” (*Id.* at 6–10). Thus, Poulsen asserts that early termination is warranted by his conduct and serves the interest of justice. (*Id.*).

The Government opposes. The Government cites the nature and circumstances of Poulsen’s offenses, the substantial amount of restitution outstanding, and the “great deal of leniency that Poulsen has already received,” to argue against early termination. (ECF No. 1460 at 6–8). It points to Poulsen’s actions that defrauded investors out of approximately \$2.4 billion, many of which have not been made financially whole. (*Id.* at 7). The United States further asserts that “defendant’s productive volunteer work and his compliance with supervised release . . . are not, in and of themselves, a sufficient basis for terminating his supervised release.” (*Id.* at 10). The United States concludes by asserting “conduct like Poulsen’s sophisticated fraud scheme must be deterred; continuing his supervised release for the length of its original term will serve the interests of justice in that regard.” (*Id.*).

## II. LAW AND ANALYSIS

The Court may terminate a term of supervised release any time after one year of supervised release if such action is warranted by the conduct of the defendant and the interest of justice. 18 U.S.C. § 3583(e). Factors the Court should consider include: the nature and circumstances of the offense; the history and characteristics of the defendant; whether adequate deterrence was afforded; protection of the public from further crimes of the defendant; providing the defendant with educational or vocational training; the sentencing range established by the guidelines; pertinent policy statements issued by the Sentencing Commission; the need to avoid sentence disparity; and the need to provide restitution to victims. *Id.*; 18 U.S.C. § 3553. Justice allows a court to consider a broad range of these factors in addition to an individual's behavior. *United States v. Suber*, 75 Fed. App'x 442, 444 (6th Cir. 2003) (citing *United States v. Pregent*, 190 F.3d 279, 282 (4th Cir. 1999)) (holding a court does not have to consider every factor in order to make a valid judgment call in cases of termination of supervised release).

In this case, the need to provide further educational or vocational training is not relevant. The Court must consider, however, the remaining factors set out in § 3553. Mr. Poulsen was convicted of money laundering, conspiracy, securities fraud, and witness tampering. (ECF No. 857); *see also United States v. Poulsen*, No. 2:07-cr-209 (ECF Nos. 109, 139). He completed less than half of his original prison sentence. (ECF No. 1459 at 14). While he has volunteered his time and skill in various capacities since his release from incarceration, a substantial amount of restitution, which exceeds \$2.4 billion, remains owed to the victims. (ECF Nos. 1459 at 6–10; 1460 at 7). Indeed, at the time of sentencing, Poulsen's sentence correlated with the sentencing guidelines. Thus, for deterrence purposes no further reduction in Poulsen's sentence is justified.

Having considered the relevant statutory factors set out in § 3553, and the objections from both the Government and U.S.P.O. Dawsy, this Court concludes that early termination from supervised release is not warranted in this case.

**III. CONCLUSION**

For the foregoing reasons, Poulsen's Motion to Terminate Supervised Release (ECF No. 1459) is hereby **DENIED**.

**IT IS SO ORDERED.**

\_\_\_\_\_  
**ALGENON L. MARBLEY**  
**CHIEF UNITED STATES DISTRICT JUDGE**

**Dated: April 26, 2023**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**RICHARD ROMAN,**

**Defendant.**

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**Case No. 2:14-cr-043**

**Chief Judge Algenon L. Marbley**

**ORDER**

This matter comes before the Court on Defendant’s third *pro se* Motion for Compassionate Release. (ECF No. 67). For the reasons that follow, Defendant’s Motion is **DENIED**.

In November 2014, this Court sentenced Defendant to 144 months’ imprisonment for attempted coercion and enticement of a minor, to be followed by twenty years of supervised release. (ECF No. 40). In January 2021, Defendant filed a motion seeking compassionate release pursuant to 18 U.S.C. § 3582(c). (ECF No. 50). This Court denied the motion in July 2021. (ECF No. 55). Defendant appealed the denial to the Sixth Circuit, which affirmed in January 2022. (ECF No. 59).

In July 2022, Defendant filed his second motion for compassionate release. (ECF No. 62). This motion requested compassionate release based on Defendant’s glaucoma-induced blindness (*Id.* at 1–3), a topic which this Court discussed at length in its prior ruling (See ECF No. 55 at 7–8). As such, this Court again denied Defendant’s motion on August 24, 2022. (ECF No. 64). Referencing its prior order, this Court again found that Defendant’s medical condition constituted an “extraordinary and compelling” reason justifying release; nonetheless, the “heinous” nature of his offense precluded compassionate release. (*Id.* at 1).

Undeterred by this Court's rulings, Defendant filed a third motion for compassionate release in January 2023. (ECF No. 67). This motion is ripe for review.

An inmate filing a motion for compassionate release must first meet the threshold requirement of exhaustion. *United States v. Alam*, 960 F.3d 831, 832 (6th Cir. 2020). Once the movant has satisfied this threshold, the district court must follow the three-step framework articulated by the Sixth Circuit in *United States v. Jones* in resolving the motion. 980 F.3d 1098, 1107–08 (6th Cir. 2020). When an incarcerated person demonstrates “extraordinary and compelling reasons” which could justify a reduction in sentence, this Court must also consider “all relevant § 3553(a) factors before rendering a compassionate release decision.” (ECF No. 55 at 8) (citing *Jones*, 980 F.3d at 1114). A movant's failure to satisfy any of the three steps will compel denial of the motion. *United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021) (“[D]istrict courts may deny compassionate-release motions when any of the three prerequisites listed in § 3582(c)(1)(A) is lacking and do not need to address the others.”).

This Court appreciates Defendant's zealousness in advocating for his freedom. This Court notes, however, that the instant motion lacks any new evidence or argument warranting a different outcome with respect to Defendant's latest attempt to secure a sentence reduction.<sup>1</sup> Although laudable that Defendant completed his facility's Residential Drug Abuse Program (*See* ECF No. 67–1), the law remains clear that “rehabilitation alone does not provide a proper basis for relief.” *United States v. Ruffin*, 978 F.3d 1000, 1009 (6th Cir. 2020) (internal quotations omitted). This Court has twice before found that the balancing of the relevant § 3553(a) factors, considering the nature of Defendant's offense, fails to justify a sentence reduction. Nothing in Defendant's instant

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<sup>1</sup> Defendant filed three separate motions for release within 24 months. (ECF Nos. 50, 62, 67). With this Order, this Court has denied all three motions on the same basis. This Court cautions Defendant that any future motions for compassionate release based on these same, thrice-rejected arguments will be viewed as vexatious in nature.

motion warrants a change of course. Accordingly, this Court **DENIES** Defendant's Motion for Compassionate Release. (ECF No. 67).

**IT IS SO ORDERED.**

\_\_\_\_\_  
**ALGENON L. MARBLEY**  
**CHIEF UNITED STATES DISTRICT JUDGE**

**DATED: March 6, 2023**

## Applicant Details

First Name	Madeleine
Last Name	Voigt
Citizenship Status	U. S. Citizen
Email Address	<a href="mailto:voigtmaddie@gmail.com">voigtmaddie@gmail.com</a>
Address	<div> <div>Address</div> <div> <div>Street</div> <div>509 N Fremont Ave., Unit 113</div> <div>City</div> <div>Tampa</div> <div>State/Territory</div> <div>Florida</div> <div>Zip</div> <div>33606</div> <div>Country</div> <div>United States</div> </div> </div>
Contact Phone Number	3524671366

## Applicant Education

BA/BS From	University of South Florida
Date of BA/BS	December 2017
JD/LLB From	Stetson University College of Law
	<a href="http://www.nalplawsonline.org/ndlsdir_search_results.asp">http://www.nalplawsonline.org/ndlsdir_search_results.asp</a>
Date of JD/LLB	May 13, 2023
Class Rank	33%
Law Review/Journal	Yes
Journal(s)	Stetson Business Law Review
Moot Court Experience	No

## Bar Admission

## Prior Judicial Experience

Judicial Internships/  
Externships      **No**  
Post-graduate Judicial  
Law Clerk      **No**

### **Specialized Work Experience**

### **Recommenders**

Hopper, Ryan  
hopperr@gtlaw.com  
8133185707

Weiner, Erica  
es0725@gmail.com  
917-601-9949

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Madeleine Voigt  
509 N. Fremont Ave.  
Unit 113  
Tampa, FL 33606

July 30, 2023

Hon. Julien Xavier Neals  
United States District Court for the District of New Jersey  
Martin Luther King, Jr. Federal Building and United States Courthouse  
50 Walnut Street  
Newark, NJ 07102

Dear Judge Neals:

I am writing to apply to the pro bono clerkship in your chambers for the 2023-2024 term. I am a Law Clerk at Greenberg Traurig and graduate of Stetson University College of Law, where I served as Notes & Comments Editor on the *Stetson Business Law Review*.

My resume, law school transcript, writing samples, and letters of recommendation are enclosed. Please let me know if you require additional information. Thank you for your consideration.

Respectfully,

  
Madeleine J. Voigt

**MADELEINE J. VOIGT**  
(352) 467-1366 – mvoigt@law.stetson.edu  
Tampa, Florida 33606

## EDUCATION

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### STETSON UNIVERSITY COLLEGE OF LAW, Gulfport, FL

J.D., May 2023

Honors: *Stetson Business Law Review*, Notes & Comments Editor  
Dean's List, Spring 2021; Honor Roll, Fall 2020  
Highest Grade Designation: Ethics & The Practice of Criminal Law  
GPA: 3.278  
Rank: 85/263 (Top 33%)

### UNIVERSITY OF SOUTH FLORIDA, Tampa, FL

B.S., Finance, December 2017

GPA: 3.48  
Honors: Florida Academic Scholarship Recipient; USF Director's Scholarship Recipient

## EXPERIENCE

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### GREENBERG TRAURIG, Tampa, FL November 2020 – May 2021, April 2022 – Present *Law Clerk*

Research and draft memoranda in support of motions regarding substantive and procedural issues, including complex discovery issues. Research expert witness testimony and *Daubert* challenges. Proofread court filings and ensure citations follow *The Bluebook*. Attend strategy calls with expert witnesses.

### ASHLEY FURNITURE INDUSTRIES, Tampa, FL May 2021 – April 2022 *Trademark & Licensing Paralegal*

Conducted clearance searches in USPTO database (TESS) and common law searches for proposed trademarks. Prepared and filed Trademark applications with the USPTO.

### ALLSTATE, Tampa, FL September 2018 – November 2020 *Litigation Paralegal*

Prepared responses to requests for production and interviewed clients for interrogatory answers. Requested medical records via subpoena. Scheduled independent medical examinations (IMEs).

### DPW LEGAL, Wesley Chapel, FL March 2016 – November 2017 *Paralegal/Legal Assistant*

Scheduled hearings, depositions, and mediations. Reviewed citations to record on appeal in draft briefs for accuracy. Prepared Copyright and Trademark applications.

## INTERESTS

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Pickleball, investigative journalism, tropical houseplants

(/StudentSelfService/)

Madeleine J Voigt

Student Academic Transcript

## Academic Transcript

### Transcript Level

Law

### Transcript Type

Law Sch Transcript w/Rank

### Student Information

Degrees Awarded

Institution Credit

Transcript Totals

This is not an official transcript. Courses which are in progress may also be included on this transcript.

### Student Information

#### Name

Madeleine J Voigt

#### Curriculum Information

#### Current Program :

#### Program

Juris Doctor

#### College

Law School

#### Major and Department

Law, Department  
not Declared

## Degrees Awarded

Awarded	Degree Date
Juris Doctor	05/13/2023
<b>Major</b>	
Law	

## Institution Credit

Term : Fall 2019-Law

### Academic Standing

Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1181	Law School-GULFPORT	LW	CONTRACTS	275	4.000	11.00	
LAW	1290	Law School-GULFPORT/TAMPA	LW	TORTS	275	4.000	11.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
<b>Current Term</b>	8.000	8.000	8.000	8.000	22.00	2.750
<b>Cumulative</b>	8.000	8.000	8.000	8.000	22.00	2.750

Term : Spring 2020-Law

### Term Comments

A global health emergency during this term

required significant changes in course delivery

for most courses. All courses impacted by the

change in delivery were graded on a pass/fail

system.

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1150	Law School-GULFPORT/TAMPA	LW	CIVIL PROCEDURE	P	4.000	0.00	
LAW	1270	Law School-GULFPORT/TAMPA	LW	RESEARCH AND WRITING I	P	4.000	0.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
<b>Current Term</b>	8.000	8.000	8.000	0.000	0.00	
<b>Cumulative</b>	16.000	16.000	16.000	8.000	22.00	2.750

Term : Summer 2020-Law

## Academic Standing

Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1251	Law School-GULFPORT/TAMPA	LW	REAL PROPERTY	350	4.000	14.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	4.000	4.000	4.000	4.000	14.00	3.500
Cumulative	20.000	20.000	20.000	12.000	36.00	3.000

Term : Fall 2020-Law

## Academic Standing

Good Standing

## Additional Standing

Honor Roll

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1200	Law School-GULFPORT	LW	CRIMINAL LAW	375	4.000	15.00	
LAW	1275	Law School-GULFPORT/TAMPA	LW	RESEARCH AND WRITING II	275	3.000	8.25	
LAW	2350	Law School-DISTANCE LEARNING	LW	PROFESSIONAL RESPONSIBILITY	350	3.000	10.50	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	10.000	10.000	10.000	10.000	33.75	3.375
Cumulative	30.000	30.000	30.000	22.000	69.75	3.170

Term : Spring 2021-Law

**Academic  
Standing**

Good Standing

**Additional  
Standing**

Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	1195	Law School-GULFPORT/TAMPA	LW	CONSTITUTIONAL LAW I	350	4.000	14.00	
LAW	2190	Law School-GULFPORT	LW	EVIDENCE	400	4.000	16.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
<b>Current Term</b>	8.000	8.000	8.000	8.000	30.00	3.750
<b>Cumulative</b>	38.000	38.000	38.000	30.000	99.75	3.325

Term : Summer 2021-Law

**Academic  
Standing**

Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	3502	Law School-DISTANCE LEARNING	LW	FLORIDA CRIMINAL PROCEDURE	325	3.000	9.75	
LAW	3592	Law School-DISTANCE LEARNING	LW	INTERVIEWING AND COUNSELING	350	2.000	7.00	
LAW	3761	Law School-DISTANCE LEARNING	LW	NEGOTIATION AND MEDIATION	300	2.000	6.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
<b>Current Term</b>	7.000	7.000	7.000	7.000	22.75	3.250
<b>Cumulative</b>	45.000	45.000	45.000	37.000	122.50	3.310

Term : Fall 2021-Law

## Academic Standing

Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	3040	Law School-GULFPORT	LW	ADMINISTRATIVE LAW	275	3.000	8.25	
LAW	3154	Law School-GULFPORT	LW	BUSINESS ENTITIES	350	4.000	14.00	
LAW	3174	Law School-GULFPORT	LW	BUSINESS LAW REVIEW EDITOR	S+	2.000	0.00	
LAW	3487	Law School-DISTANCE LEARNING	LW	FINANCIAL ADVOCACY	S	1.000	0.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
<b>Current Term</b>	10.000	10.000	10.000	7.000	22.25	3.178
<b>Cumulative</b>	55.000	55.000	55.000	44.000	144.75	3.289

Term : Spring 2022-Law

## Academic Standing

Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	3090	Law School-DISTANCE LEARNING	LW	ADVANCED LEGAL RESEARCH	325	2.000	6.50	
LAW	3174	Law School-GULFPORT	LW	BUSINESS LAW REVIEW EDITOR	S+	2.000	0.00	
LAW	3190	Law School-DISTANCE LEARNING	LW	COMMERCIAL TRANSACTIONS	325	4.000	13.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	8.000	8.000	8.000	6.000	19.50	3.250
Cumulative	63.000	63.000	63.000	50.000	164.25	3.285

Term : Summer 2022-Law

## Academic Standing

Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	3393	Law School-DISTANCE LEARNING	LW	ETHICS & THE PRACTICE OF CRIMINAL LAW	400	3.000	12.00	
LAW	3541	Law School-GULFPORT	LW	INDIVIDUAL RESEARCH PROJECT	S	1.000	0.00	
LAW	3607	Law School-DISTANCE LEARNING	LW	JUDICIAL PRACTICE	S+	2.000	0.00	
LAW	3894	Law School-DISTANCE LEARNING	LW	SURVEY OF FLORIDA LAW	S	2.000	0.00	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	8.000	8.000	8.000	3.000	12.00	4.000
Cumulative	71.000	71.000	71.000	53.000	176.25	3.325

Term : Fall 2022-Law

**Academic  
Standing**

Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	3140C	Law School-DISTANCE LEARNING	LW	APPELLATE PRAC & ADV: CRIMINAL	325	3.000	9.75	
LAW	3152	Law School-DISTANCE LEARNING	LW	BANKRUPTCY	300	3.000	9.00	
LAW	3764	Law School-DISTANCE LEARNING	LW	OVERVIEW OF FLORIDA LAW	275	3.000	8.25	

Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	9.000	9.000	9.000	9.000	27.00	3.000
Cumulative	80.000	80.000	80.000	62.000	203.25	3.278

Term : Spring 2023-Law

**Academic  
Standing**

Good Standing

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	R
LAW	3685	Law School-DISTANCE LEARNING	LW	LAW PRACTICE MANAGEMENT	S	2.000	0.00	
LAW	3696C	Law School-DISTANCE LEARNING	LW	ADV LGL WRT: CONTRACT DRAFTING	S	2.000	0.00	

LAW	3751	Law School-DISTANCE LEARNING	LW	MULTISTATE STRATEGIES	325	4.000	13.00
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Term Totals	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term	8.000	8.000	8.000	4.000	13.00	3.250
Cumulative	88.000	88.000	88.000	66.000	216.25	3.276

## Transcript Totals

### Level Comments

FINAL CLASS

RANK: 87/256

Transcript Totals - (Law)	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution	88.000	88.000	88.000	66.000	216.25	3.276
Total Transfer	0.000	0.000	0.000	0.000	0.00	0.000
Overall	88.000	88.000	88.000	66.00	216.25	3.276



July 30, 2023

The Honorable Julien Neals  
Martin Luther King, Jr. Federal Building and  
United States Courthouse  
50 Walnut Street, Room 5054  
Newark, NJ 07102

Dear Judge Neals:

I write in support of Madeleine "Maddie" Voigt's application to serve as a law clerk to Your Honor. My name is Ryan Hopper. I am a litigation shareholder at Greenberg Traurig, P.A., and a former law clerk to a U.S. district judge.

Over the past few years and while also attending law school, Maddie has worked as a paralegal in our complex-litigation practice. We predominantly defend sophisticated clients in mass-tort and class actions, and we staff cases leanly to concentrate knowledge and remain nimble. The work is rewarding but demanding.

Maddie has become a core team member and has consistently "punched above her weight" for her age and experience. She routinely helps multiple national-caliber expert witnesses develop opinions on diverse scientific topics—compiling studies and other materials for consideration, participating in working meetings with experts, and serving as a sounding board for anticipated testimony. She contributes to potentially dispositive legal analyses and has helped prepare dozens of Daubert and summary-judgment motions. She supports technical depositions, manages electronic discovery, and otherwise seems to take any laboring oar she can to help represent our clients efficiently and effectively.

I have no doubt that Maddie would prove to be an excellent clerk. Aside from the wealth of practical experience she would bring to the role, Maddie is intellectually curious, hard-working, practical, and self-motivated. And sometimes just as important in close-knit working environments, Maddie has a fantastic attitude. I am confident our colleagues would all agree that Maddie keeps our spirits up when the stakes are high and the nights are long.

Our practice group views clerkships as so valuable that we very rarely hire lawyers directly out of law school. We have not done so in years, much preferring instead to seek young lawyers coming out of federal clerkships. Maddie is an exception, and we are extending her an offer to join us as a lawyer when she graduates and passes the Bar. Even still, we fully support her interest in pursuing a clerkship. My own remains one of the most meaningful periods of my life and career. I hope Maddie can have a similar experience, and I know she would well serve her court and country.

If Your Honor has any questions about Maddie, it would be my pleasure to answer them.

Respectfully,

Ryan Hopper

Shareholder

Greenberg Traurig, P.A.

Tampa, FL 33602

(813) 318-5707

hopperr@gtlaw.com

Ryan Hopper - hopperr@gtlaw.com - 8133185707

**Erica J. Weiner**

Telephone: (917)601-9949

Email: EricaJayneWeiner@gmail.com

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March 19, 2023

Dear Judge:

I am writing this letter of recommendation in support of Madeleine Voigt for a judicial clerkship with Your Honor upon her upcoming graduation from law school in May 2023.

I first met Madeleine several years ago when she interviewed with me to be a Trademark & Licensing Paralegal on my Intellectual Property and Retail team at Ashley Furniture Industries. At the time, my position was Assistant General Counsel, Global IP & Retail at Ashley Furniture Industries, and I was looking for a candidate who had some fundamental skills, but had a yearning to learn more and really develop in the paralegal role. Madeleine impressed me from the moment we met - she was bright, motivated and was passionate about learning. She did not appear to be the type of candidate who was just saying these things to get the job, but actually meant them. Happily, this proved to be true, and while working together at Ashley Furniture Industries, Madeleine used her prior knowledge as the building blocks, and continued to learn different areas of the law, from global trademark prosecution, to intellectual property enforcement management and drafting retail store licenses and amendments. She continued to impress me, and even more so as she was a full time law student while working on my team, and handled the balancing of her obligations incredibly well. What impressed me even more was her ability to learn, accept feedback, and incorporate it in her work going forward. She was a great listener and was always trying to think of ways to help.

Based upon my experience with Madeleine, I believe she certainly has the requisite skills to excel in a clerkship, and believe her enthusiasm would only help guarantee success in this role. I hope you will consider her for a clerkship position, and thank you for your consideration.

Best regards,



Erica J. Weiner

who “made no attempt to quantify the relative contribution of [the plaintiff’s] risk factors”). For these and other reasons, Kendall’s opinions are unreliable and should be excluded.

## ARGUMENT

### I. Dr. Kendall is not qualified to opine on specific causation in this case.

Dr. Kendall is a wildlife toxicologist.<sup>7</sup> He is not qualified to opine on the cause of Mr. Vandestreek’s rare form of primary brain cancer, GBM. *In re 3M Combat Arms Earplug Products Liab. Litig.*, 2021 WL 948839, at \*9 (N.D. Fla. Mar. 13, 2021) (finding exposure scientist with no medical training not qualified to offer a specific-causation opinion); *see also Konikov v. Orange County*, 290 F. Supp. 2d 1315, 1317 (M.D. Fla. 2003) (“It is not enough that a witness is qualified in some way related to the subject matter . . . the witness must have special knowledge about the discrete subject on which he or she is to testify.”). Kendall has no expertise in GBM, or any type of cancer in humans. Kendall has never rendered an opinion, in any context outside of this case, concerning GBM.<sup>8</sup> In fact, other than being “aware” of GBM in his professorial capacity, Kendall cannot point to any professional work involving GBM.<sup>9</sup> The same is true for brain cancer in general: he cannot point to a single opinion, peer-reviewed article, or study of his that concerns brain cancer in humans.<sup>10</sup> Instead, the majority of

<sup>7</sup> Dr. Kendall is Professor of **Wildlife** Toxicology and Head of the **Wildlife** Toxicology Laboratory at Texas Tech University. *See* Doc. 180-12. He has a Ph.D. in Fisheries and Wildlife Sciences, and a M.S. in Wildlife Biology. *See* Doc. 180-1 at 16.

<sup>8</sup> (Doc. 180-11 at 27:10–17; *see also* Doc. 111-2 at 107:4–8.)

<sup>9</sup> (*See* Doc. 111-2 at 104:13–19.)

<sup>10</sup> (*See* Doc. 111-2 at 105:4–13 ; *see also* Doc. 180-11 at 24:9–15; 25:25–26:2.)

Kendall's research appears focused on quail.<sup>11</sup> Tellingly, a search for "cancer" in his 118-page CV yields no results.<sup>12</sup> Without adequate experience with primary brain cancers like GBM, Dr. Kendall cannot reliably opine on its cause.

Dr. Kendall also lacks verifiable experience investigating and researching the chemical exposure and medical condition at issue. *See Evans v. Matrixx Initiatives, Inc.*, 2009 WL 2914252, at \*9 (M.D. Fla. Feb. 18, 2009). Like with cancer, Kendall has never conducted a study, published an article, or performed in peer-reviewed research involving VC.<sup>13</sup> And he has **never** conducted a human health risk assessment concerning VC.<sup>14</sup> Moreover, Kendall's efforts to analyze epidemiological studies of VC and brain cancer have been misleading and incomplete, as he fails to cite updates to cohort studies or more recent studies that refute his causation opinions.<sup>15</sup> Accordingly, Kendall cannot provide a reliable opinion on any association between VC and GBM, and thus his testimony should be excluded.

<sup>11</sup> (Doc. 180-1 at 16–136 – "quail" appears 144 times in his CV.)

<sup>12</sup> *Id.*

<sup>13</sup> (*See* Doc. 180-11 at 24:21–25:12.)

<sup>14</sup> (*See* Doc. 111-2 at 38:12–25.)

<sup>15</sup> Dr. Kendall's reports cite two IARC studies about vinyl chloride but failed to cite the most recent IARC study finding "inconsistent or scanty evidence that vinyl chloride is associated with brain cancer." (*See* Doc. 180-11 at 69:15–71:22). In deposition, Dr. Kendall admitted that the "latest statement or most recent review of vinyl chloride by IARC" was "less strong," but he did not cite this statement in his report. (*See* Doc. 180-11 at 65:23–25). He did the same with cohort studies and other scientific updates. (*See* Doc. 180-11 at 81:15–81:22 ("Q. You rely upon earlier studies, Dr. Kendall, but you don't cite the most recent studies, including Mundt 2017 or this ATSDR 2023, correct? A. Like I say, I couldn't cite everything. I couldn't carry my report around. I already had over 100 references.").)

**FRE 404(b): Ensuring H.R. 8531 Fully Restores Artistic Protection****I. Introduction**

“Freedom of thought, freedom of speech – it’s one of the most important things we have.”<sup>1</sup> David Bowie’s remarks following the censorship of 2 Live Crew’s album *As Nasty as They Wanna Be* in 1990 are still pertinent, as an increasing number of prosecutors put rap on trial.<sup>2,3</sup> Treating lyrics like confessions, prosecutors repeatedly introduce rap lyrics as incriminating evidence.<sup>4</sup>

For decades, legal experts have debated the admissibility of defendants’ artistic expressions as criminal evidence, while the evidentiary tactics employed by prosecutors continue to metamorphosize.<sup>5</sup> Historically, prosecutors have offered rap lyrics as evidence of a defendant’s motive, intent, or proof of guilt in cases involving violent allegations.<sup>6</sup> Recently, however, prosecutors have shifted to using lyrics as evidence of crimes with broader factual scopes, like conspiracy.<sup>7</sup> For example, prosecutors might argue that a defendant should be convicted of conspiracy because the defendant composed lyrics describing, encouraging, and/or facilitating criminal activity.<sup>8</sup> What’s more, use of rap in the courtroom comes with extreme disproportionality. Over 500 state and federal criminal cases involve rap as evidence, compared to nominal instances implicating other genres.<sup>9</sup>

The legal debate intensified when numerous members of record label YSL (“Young Stoner Life”), including Billboard Hot 100 artists Gunna and Young Thug, were indicted on

<sup>1</sup> David Bowie Stops Show to Defend 2 Live Crew, ORLANDO SENTINEL (July 14, 1990, 12:00 AM), <https://www.orlandosentinel.com/news/os-xpm-1990-07-14-9007140630-story.html>.

<sup>2</sup> *Id.*

<sup>3</sup> David Reese, *Experts Decry Increasing Use of Rap Lyrics in Criminal Trials*, COURTHOUSE NEWS SERVICE (Sept. 7, 2017), <https://www.courthousenews.com/experts-decry-increasing-use-rap-lyrics-criminal-trials/> (sociologist describes alarming trend of prosecutors using rap lyrics in the prosecution of violent crimes); *see also* Erik Nielson, *Prosecutors are Increasingly - and Misleadingly - Using Rap Lyrics as Evidence in Court*, THE CONVERSATION (Mar. 17, 2020, 8:00 AM) <https://theconversation.com/prosecutors-are-increasingly-and-misleadingly-using-rap-lyrics-as-evidence-in-court-131440>.

<sup>4</sup> *See* Reese at 1.

<sup>5</sup> By Anoa Changa, *ACLU of Georgia and Inner-City Muslim Action Network Explore ‘Rap on Trial’*, NEWSONE (Aug. 13, 2022), <https://newsone.com/4389963/georgia-rap-on-trial-panel/> (“‘We see it now happening is that some artists are being accused of supporting and promoting and dedicating gang activity or other themselves [sic] benefiting in their artistic careers through the creation of lyrics,’ Dennis continued. ‘In some jurisdictions, that is a crime to promote, support, facilitate, help criminal activity through talking about the exploit of others.’”).

<sup>6</sup> Jeremy Wang-Iverson, *Rap on Trial: Conversation with Erik Nielson and Andrea L. Dennis*, VESTOPR (April 17, 2020) <https://vestopr.com/rap-on-trial-conversation-with-erik-nielson-and-andrea-l-dennis/>

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Chris Eggertsen, *Megan Thee Stallion, Post Malone & More Music Heavyweights Demand Limits on Using Rap Lyrics in Court*, BILLBOARD (Nov. 1, 2022), <https://www.billboard.com/pro/rap-lyrics-evidence-artists-demand-limits-criminal-trials/> (“According to a press release, experts have found over 500 cases involving rap as evidence in public records, though it notes that number does not account for indictment proceedings, juvenile cases or cases that end in a plea bargain ... could only find four instances of non-rap lyrics being submitted as evidence since 1950, three of which were thrown out while the fourth was overturned post-conviction.”).

RICO charges in May of 2022.<sup>10,11,12</sup> The 56-count indictment filed against 28 defendants in Fulton County, GA includes allegations ranging from murder to conspiracy to commit a crime.<sup>13</sup> In support of the RICO allegations, the indictment cites multiple music videos and lyrics as “overt acts in furtherance of the conspiracy,” including those from Gunna and Young Thug’s certified Gold duet, “Ski.”<sup>14,15</sup> However, understanding rap’s purpose yields that, at their core, the offered lyrics are simply character evidence.

Attributable to the ongoing debate revived by Gunna and Young Thug’s indictment, in July 2022 Congress introduced the Restoring Artistic Protection Act.<sup>16</sup> The bill introduces Federal Rule of Evidence 416, which seeks to limit the admissibility of artistic expressions in criminal proceedings by requiring the prosecution to prove the relevance of an artistic expression by “clear and convincing evidence.”<sup>17</sup> However, the framework of proposed FRE 416 will not adequately protect rap artists because rap lyrics are left vulnerable to prejudicial admission.<sup>18,19</sup> Thus, without change, the dangers of “rap on trial” being merely a derivative of censorship remain.

This article argues that properly protecting artistic expression requires explicit inadmissibility of expressions implicating an artist’s propensity to commit a crime. Part II of this article discusses the origins and common misconceptions of rap. Part III of this article explores the evidentiary avenues through which rap is put on trial and conflicting jurisprudence. Part IV of this article provides analysis explaining why the RAP Act, as is, will not fully restore artistic protection to rap artists. Part V of this article explains the RAP Act’s impact on the ability of rap artists to remain uninhibited and proposes that the admissibility of artistic expressions be explicitly limited to the uses permitted under FRE 404(b).

## II. History and Perceptions of Rap

### a. Rap’s Roots

<sup>10</sup> *Gunna, Chart History*, BILLBOARD, <https://www.billboard.com/artist/gunna/> (last visited Dec. 30, 2022).

<sup>11</sup> *Young Thug, Chart History*, BILLBOARD, <https://www.billboard.com/artist/young-thug/> (last visited Dec. 30, 2022).

<sup>12</sup> *The State of Georgia v. Kahliff Adams a/k/a Bobby Hunt, et al.*, No. 22SC82273 (Fulton Superior Ct. May 9, 2022), <https://www.courthousenews.com/wp-content/uploads/2022/05/young-slime-life-indictment.pdf> (last visited Dec. 30, 2022).

<sup>13</sup> *See id.*

<sup>14</sup> *Id.* at 47.

<sup>15</sup> *Gold & Platinum*, RIAA, [https://www.riaa.com/gold-platinum/?tab\\_active=default-award&ar=Young+Stoner+Life&ti=Ski&format=Single&type=#search\\_section](https://www.riaa.com/gold-platinum/?tab_active=default-award&ar=Young+Stoner+Life&ti=Ski&format=Single&type=#search_section) (last visited Dec. 30, 2022).

<sup>16</sup> Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. § 2(a) (2022). The bill seeks to limit the admissibility of a defendant’s creative or artistic expression as evidence against the defendant in a criminal proceeding, theoretically putting an end to rap on trial. *See id.* Requiring the prosecution to prove an artistic expression’s relevancy by “clear and convincing evidence” is a significant step towards ending the exploitation of rap. *See id.*

<sup>17</sup> *See id.*

<sup>18</sup> The proposed rule would become FED. R. EVID. 416. *Id.*

<sup>19</sup> “Federal Rules of Evidence” is abbreviated as “FRE.”

Albeit a diasporic and polyculture genre with worldwide origins, the origins of rap in the U.S. can be traced back to the early 1970s in Bronx, New York City.<sup>20</sup> In the 1970s, New York City underwent economic restructuring that had significant socioeconomic impact.<sup>21</sup> Perhaps the most heavily impacted borough, the Bronx was decimated by fiscal crisis and deindustrialization.<sup>22</sup> Many Blacks and Puerto Ricans were displaced and saw the rise of street gang activity and drug markets firsthand.<sup>23</sup>

Social gatherings and parties became an outlet to discuss and reflect on the hardships from the city's political and economic transformation.<sup>24</sup> Block parties featuring DJs (disc jockeys), MCs (masters of ceremony), and dancing were status quo.<sup>25</sup> In response to the crowd's enjoyment and dancing to the drum breaks in disco, funk, soul, and electronica songs, DJs began isolating percussion breaks and creating the musical composition, "hip-hop."<sup>26</sup>

Originally, MCs introduced DJs and kept the crowd energized between songs.<sup>27</sup> Eventually, however, MCs began to talk over and rhyme in sync with the repurposed music, morphing into "rappers."<sup>28</sup> Using the beat as a medium, they poetically discussed personal experiences and reflected on poverty, urban renewal, deindustrialization, and inner-city violence.<sup>29</sup> Rapper-MCs began forming groups and hosting rap battles to gain supremacy in the new genre.<sup>30</sup> The winner of these lyrical battles catered to the audience, often relying on boasted and exaggerated depictions of real life to entertain the crowd.<sup>31</sup>

As rap's popularity continued to increase, rappers continued to experiment with their vocals and lyrical content.<sup>32</sup> Hip-hop trio "The Sugarhill Gang" found a winning formula. In January of 1980, the trio's self-titled album released, making it the first hip-hop studio album and the beginning of rap's commercial success.<sup>33</sup> The album's leading single, "Rapper's Delight," was the first rap single to become a Billboard Top 40 hit.<sup>34</sup> From here, the popularity of

<sup>20</sup> Austin McCoy, *Rap Music*, OXFORD RESEARCH ENCYCLOPEDIAS (Sept. 26, 2017), <https://oxfordre.com/americanhistorical/display/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-287.jsessionid=45C9F59D83511046BD44B1BA99C6F91F>.

<sup>21</sup> *See id.*

<sup>22</sup> As the industrial sector disappeared, the youth unemployment rate rose to 60%. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> David Dye, *The Birth of Rap: A Look Back*, NPR WORLD CAFE (Feb. 22, 2007, 1:06 PM), <https://www.npr.org/2007/02/22/7550286/the-birth-of-rap-a-look-back>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See* Artist Profile: Cold Crush Brothers, HHGA, <https://hiphopgoldenage.com/artists/cold-crush-brothers/> (last visited Dec. 30, 2022) (discussing ongoing lyrical battle between The Cold Crush Brothers and The Fantastic Five during the late 1970s to early 1980s).

<sup>31</sup> *See* Dye, *supra* note 26; *see also* Erik Nielson, 'Rap on Trial': Why Lyrics Should be Off-Limits, ROLLING STONE (May 3, 2017), <https://www.rollingstone.com/culture/culture-news/rap-on-trial-why-lyrics-should-be-off-limits-116368/> ("The rhetoric of rap music is both complex and slippery; it is often intentionally hyperbolic as well, drawing on the long tradition of boasting and exaggeration.").

<sup>32</sup> *See* Charles Burchell, *How Rap Ushered the Piano Into Its Next Developmental Phase*, FLYPAPER (July 18, 2018), <https://flypaper.soundfly.com/discover/how-rap-ushered-the-piano-next-developmental-phase/>

<sup>33</sup> Dye, *supra* note 26.

<sup>34</sup> *The Sugarhill Gang's 'Rapper's Delight' becomes Hip-hop's first Top 40 hit*, HISTORY.COM EDITORS (April 1, 2010), <https://www.history.com/this-day-in-history/the-sugarhill-gangs-rappers-delight-becomes-hip-hops-first-top-40-hit>.

rap only continued to increase, paving the way to a decade that culminated as the “Golden Age of Rap.”<sup>35</sup>

Despite reaching mainstream status, rap continued to transform and evolve. In the 1990s, “gangsta rap” became an extremely popular, yet controversial, subgenre.<sup>36</sup> This decade also birthed a regional divide, as different styles of “gansta rap” grew popular in certain areas around the country and competition between record labels to find the top entertainer grew.<sup>37</sup> Unfortunately, this divide turned into a feud, “East Coast v. West Coast,” that plagued the genre during the remainder of the 1990s and fostered a lot of stigmas and misconceptions surrounding rap today.<sup>38</sup>

However, the early 2000s were a turning point for the culture of hip-hop when the genre’s creative center headed south and its regional biases began to crumble.<sup>39</sup> The rise of technology and social media were catalysts to rap’s continued growth in popularity.<sup>40</sup> By 2018, hip-hop surpassed rock as the most popular music genre for the first time in U.S. history, where it remains today.<sup>41,42</sup>

## b. Today’s Perception of Rap

<sup>35</sup> McCoy, *supra* note 19.

<sup>36</sup> Songs from this era intensified the genre’s inherently competitive nature. See Greg Tate, *gangsta rap*, BRITANNICA, <https://www.britannica.com/art/gangsta-rap> (last visited Dec. 30, 2022). Rappers took the exaggerated essence of rap to the extreme by infusing hyperrealism and candor into their lyrics. *Id.* Notably, this extreme form of exaggeration often became a “self-protective delusional device” for listeners who lived through the dangerous, inner-city depictions. *Id.* Still, the majority of “gangsta rap” albums sold in suburban malls rather than urban shopping districts, earning record labels millions. Esther Iverem, *East vs. West: ‘Gangsta’ Rap’s War of Words*, THE WASHINGTON POST (March 10, 1997), <https://www.washingtonpost.com/archive/politics/1997/03/10/east-vs-west-gangsta-raps-war-of-words/22dba1b4-71bb-478d-b9db-274e765b33c7/>.

<sup>37</sup> See Esther Iverem, *East vs. West: ‘Gangsta’ Rap’s War of Words*, THE WASHINGTON POST (March 10, 1997), <https://www.washingtonpost.com/archive/politics/1997/03/10/east-vs-west-gangsta-raps-war-of-words/22dba1b4-71bb-478d-b9db-274e765b33c7/>.

<sup>38</sup> At the center of the feud were two of the biggest stars in the U.S. and most talented rappers in history: west coast rapper, 2Pac, and east coast rapper, Notorious B.I.G.. Isaac Semple, *Why was there a feud between West Coast vs East Coast rappers?*, HIP-HOP HERO (Oct. 8, 2022), <https://hiphophero.com/why-was-there-a-feud-between-west-coast-vs-east-coast-rappers/>. Despite being friends, the volatile conflict between their record labels caused the two to become enemies, and ultimately, the feud led to their untimely deaths. See McCoy *supra* note 19. In September of 1996, 2Pac was shot and killed, and Notorious B.I.G. was killed in a drive-by shooting only six months later. *Id.*

<sup>39</sup> Greg Tate, *Hip-hop in the 21st century*, BRITANNICA <https://www.britannica.com/art/hip-hop/Hip-hop-in-the-21st-century> (last updated Dec. 5, 2022). During these years, hip-hop planted its roots for becoming a part of mainstream pop culture, as many artists collaborated with other popular genres, like pop and R&B. *Id.* Although key players from the east and west coast remained integral to rap’s continuing success, many new stars emerged from the south and the genre turned to collaboration instead of rivalry. *Id.*

<sup>40</sup> See Leila Sampson, Hunter Christopher, et al., *Early 2000s Hip Hop*, BLACK MUSIC SCHOLAR, <https://blackmusicscholar.com/2000s-hip-hop/> (last visited Dec. 30, 2022).

<sup>41</sup> John Lynch, *For the first time in history, hip-hop has surpassed rock to become the most popular music genre, according to Nielsen*, BUSINESS INSIDER, (Jan. 4, 2018 12:44 PM) <https://www.businessinsider.com/hip-hop-passes-rock-most-popular-music-genre-nielsen-2018-1#:~:text=1%20For%20the%20first%20time%2C%20hip-hop%20surpassed%20rock,the%20first%20and%20second%20spot%2C%20respectively.%20More%20items>.

<sup>42</sup> Peter Susic, *20+ Music Genre Statistics: Most Popular Music Genres (2022)*, HEADPHONES ADDICT, (July 8, 2022) <https://headphonesaddict.com/music-genre-statistics/>.

Despite rap's evolution and immense popularity, the overall perception of rap remains negative, likely due to generational differences.<sup>43,44</sup> The difference in perception is attributable to how Baby Boomers and younger generations, like millennials, experience music.<sup>45,46,47</sup> Rather than feeling fully represented by the music of their generation, millennials focus less on musical composition and lyrics, and use music only to enhance certain parts of their everyday lives.<sup>48</sup>

Even the most popular rappers face tough criticism. A December 2022 article by Rubin Hanan, former CEO of Champs Sports, provides a harsh “Boomer’s perspective” on rap, declaring that lyrics by today’s popular artists negatively drive and influence society.<sup>49</sup> Hanan indicates that today’s artists are not worthy of praise because of their propensity for “violence, sex, rape, drugs, killing, racial slurs, and degrading of women.”<sup>50</sup>

### III. Evidentiary Avenues and Conflicting Jurisprudence

The negative perception surrounding rap lends a significant risk of prejudice. At trial, there is a material risk that some jurors will be influenced by a negative perception of rap and associate rap lyrics with the defendant’s character.<sup>51</sup> In other words, the jury will be unduly influenced – the exact harm the Federal Rules of Evidence seek to prevent.<sup>52</sup>

<sup>43</sup> See generally Lee Mizell, *Music Preferences in the U.S.: 1982-2002*, NATIONAL ENDOWMENT FOR THE ARTS, <https://files.eric.ed.gov/fulltext/ED511715.pdf> (last updated June 2005). Notably, rap music was one of two genres to increase in popularity between 1992 and 2002. *Id.* However, rap was, and still is, overwhelmingly preferred by younger generations. *Id.* For comparison, in 2002 only 21% of Baby Boomers enjoyed rap music, compared to 36% and 46% of Generations X and Net, respectively. *Id.*

<sup>44</sup> Albeit ironic coming from the generation casting Jimi Hendrix into stardom, Baby Boomers nevertheless have a negative sentiment towards rap. See generally All Things Considered, *Commentary: Boomers and Hip-Hop*, NPR, (March 11, 2004 12:00 AM) <https://www.npr.org/templates/story/story.php?storyId=1761216>. They often cite the same reasons for “hating” the genre: the lyrics are incoherent, violent, reference drug use, and riddled with foul language. *Id.* Still, many sung along with Bob Dylan as he famously declared “everybody must get stoned” in *Rainy Day Women #12 & #35*. *Id.*

<sup>45</sup> As notorious fans of rock’n’roll, Baby Boomers like to feel represented by music and focus on how music relates to their lives and values. See Pablo Saldana, *Differences in How Boomers and Millennials Experience Listening to Recorded Music*, PORTLAND STATE UNIVERSITY PDXSCHOLAR, <https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1369&context=honorstheses> (last visited Dec. 30, 2022). This desire is likely a result of rock’n’roll’s history, specifically the impact felt from the Vietnam War and protest songs. *Id.* at 6.

<sup>46</sup> Many artists tried to “match the madness” of the war, subsequently creating a pillar of rock’n’roll in way much like the MC’s battled to create the best version of rap in the 1970s. *How the Vietnam War Shaped Classic Rock*, OPEN CULTURE, (April 18, 2019) <https://www.openculture.com/2019/04/how-the-vietnam-war-shaped-classic-rock-and-how-classic-rock-shaped-the-war.html>.

<sup>47</sup> “Baby Boomer” is a term used to describe a person born in the U.S. between 1946 and 1964. *Baby Boomer*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/baby-boomer> (last visited Dec. 30, 2022).

<sup>48</sup> Saldana, *supra* note 45.

<sup>49</sup> Rubin Hanan, *Rap Music: A Boomer’s Perspective*, MANOPOUSE, (Dec. 9, 2022) <https://www.manopause.com/entertainment/rap-music-a-boomers-perspective-20814/>. Notably, the article praises lyrics by famous “gangsta rap” artists like 2Pac, Notorious B.I.G., Dr. Dre, and Ice Cube, even if the lyrics are racist and misogynistic, because of their “story of desperation and survival.” *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See Wang-Iverson, *supra* note 6.

<sup>52</sup> See FRE 404(a)(1).

In addition, a growing number of prosecutors are offering rap lyrics as evidence of broad allegations.<sup>53</sup> In this context, when lyrics are offered as confessions, the risk of unfair prejudice is amplified because the current framework for analyzing admissibility provokes a literal interpretation of lyrics. Currently, the admission of rap lyrics is implicated by four rules: FRE 401, 403, 404, and 801<sup>54,55,56,57</sup> However, like many rules in the FRE, the application of rules relevant to the admissibility of rap lyrics as evidence varies greatly by jurisdiction.

First, the lyrics must be relevant under FRE 401.<sup>58</sup> However, given the low threshold of relevancy established by this rule, it is typically not the sticking point in this analysis. Instead, the application of FRE 404 and 403 varies greatly by court, due primarily to FRE 404(b)'s interpretational caveat.<sup>59</sup> Under an inclusionary interpretation of this rule, character evidence is admissible unless it goes only to the defendant's propensity to commit a crime.<sup>60</sup> In contrast, an exclusionary interpretation of FRE 404(b) requires that all character evidence be excluded, unless it is evidence of another crime, wrong, or act offered for a specific purpose per FRE 404(b)(2).<sup>61</sup> The rule suggests permitted uses "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."<sup>62</sup>

The protections afforded to criminal defendants under an exclusionary interpretation of FRE 404(b) are two-fold. First, the prosecution can only offer evidence of other crimes, wrongs, or acts.<sup>63</sup> In other words, the evidence must have some factual basis, therefore limiting the risk of admitting evidence that only proves the defendant's propensity to commit a crime. Second, the proffered evidence must serve a specific purpose.<sup>64</sup> This requirement further limits the risk of admitting prejudicial character evidence by requiring the prosecution to show how the other crime, wrong, or act helps prove, for example, motive or intent. Thus, if a defendant's rap lyrics

<sup>53</sup> Wang-Iverson, *supra* note 6.

<sup>54</sup> FRE 401 requires a determination of relevancy. FRE 401. Remarkably, the relevancy threshold established by this rule is relatively low, so this Article assumes that any rap lyrics offered as evidence are relevant under the rule.

<sup>55</sup> FRE 403 provides that relevant evidence can be excluded if its probative value is substantially outweighed by unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, and/or needlessly presenting cumulative evidence. FRE 403. The court has broad discretion under this rule to exclude evidence that is of unquestioned relevance, but must balance the probative value of the evidence against the potential harm from its admission. *See id.*

<sup>56</sup> FRE 404 limits the use of character evidence and is subject to an interpretational caveat. *See generally* FRE 404. There are two approaches to interpreting the admissibility of other crimes, wrongs, or acts under 404(b): inclusionary and exclusionary. Dora W. Klein, "Rule of Inclusion" Confusion, 58 SAN DIEGO L.R. 379, 384-86 (2021). Inclusionary interpretation suggests that character evidence is admissible unless it only proves the defendant's propensity to commit a crime. *Id.* In contrast, exclusionary interpretation excludes character evidence unless it is evidence of a prior crime or wrong act offered to prove the uses permitted under FRE 404(b)(2). This article interprets FRE 404(b) as exclusionary. *Id.*

<sup>57</sup> FRE 801 excludes certain statements from the rule prohibiting hearsay. FRE 801. Rap lyrics are "statements" under FRE 801 as oral assertions, written assertions, or nonverbal conduct, that the defendant intended as an assertion. *See* FRE 801(d)(2)(A). Hearsay rules are implicated when the defendant's lyrics are offered to prove the charged crime, or as evidence of a prior bad act to prove the defendant's intent, motive, knowledge, etc. regarding the charged crime. In either instance, the lyrics are not hearsay. *See id.*

<sup>58</sup> FRE 401, *supra* note 54.

<sup>59</sup> FRE 404, *supra* note 56.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

are proffered and subject to an analysis employing an exclusionary interpretation of FRE 404(b), the risk of admitting prejudicial evidence decreases. Moreover, the lyrics must still undergo analysis under FRE 403.

After finding rap lyrics relevant under FRE 401, some courts skip an analysis under FRE 404 and instead treat lyrics as hearsay. Arguably, rap lyrics, or any artistic expression, fall under FRE 801(a)'s definition of hearsay.<sup>65</sup> However, equating lyrics to hearsay requires finding that the lyrics were intended as an assertion.<sup>66</sup> If such bold leap is made, the lyrics, as a "statement" offered against an opposing party, are excluded from hearsay under FRE 801(d)(2)(A).<sup>67</sup> Thus, as admissible hearsay, rap lyrics are then only subject to analysis under FRE 403. Such analysis is dangerously prejudicial to criminal defendants, as their lyrics are presumed factual without FRE 404(b)'s limitations.

#### a. *People v. Williams*

The Michigan Court of Appeals' decision in *People v. Williams* illustrates how analyzing the admissibility of rap lyrics, as statements excluded from hearsay and subject only to FRE 403, leads the court to presume lyrics are literal.<sup>68,69</sup> Here, the court found that MRE 404(b) does not apply to the defendant's lyrics, because lyrics, no matter how graphic, are inherently not a crime.<sup>70</sup> Instead, the court categorized the lyrics as statements under MRE 801, inevitably assigning truthful meaning to the lyrics. Indeed, the court highlighted that the "statement" must be one "which the party has manifested an adoption or belief in its truth."<sup>71</sup> Excluding the lyrics as hearsay under MRE 801(d)(2)(A), the court only needs to consider MRE 403.<sup>72</sup> In weighing the probative value of the lyrics against the danger of unfair prejudice to the defendant, the court read truth and meaning in to the defendant's lyrics, which contain many common, hyperbolic rap themes.<sup>73</sup> Notably, the court took three bars from the defendant's rhymes and found probative value:

The lyric "I got ragged hollow tips that's gone spit at yo dome" is poignant because defendant initially shot Pfeiffer in his head ("dome".) Further, the lyrics mention "fake n----s," which is reminiscent of witness accounts that defendant loudly proclaimed the original shooter to be a "fake-ass Eminem ass n----r." Also, the lyrics state, "when I come through you hood, you ain't no good," and

<sup>65</sup> FRE 801, *supra* note 57.

<sup>66</sup> *See id.*

<sup>67</sup> *Id.* *See also Definition: assert*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/assert> (last visited May 2, 2023) (defining "assert" as "to state or declare positively and often forcefully or aggressively," or "to compel or demand acceptance or recognition of (something, such as one's authority)"). Thus, if lyrics are a "statement" under the definition in FRE 801(a), the defendant must have intended the lyrics be true.

<sup>68</sup> Michigan Rules of Evidence 401, 403, 404, and 801 are comparable to their FRE counterparts. *See generally* MRE 401; MRE 403; MRE 404; MRE 801. This article will

<sup>69</sup> *See People v. Williams*, No. 263892, 2006 Mich. App. LEXIS 3616 (Ct. App. Dec. 14, 2006). Here, the defendant was charged with second-degree murder and possession of a firearm during the commission of a felony. *Id.* The prosecution sought to introduce the defendant's rap lyrics as evidence of the defendant's motive and intent. *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

defendant himself testified that he was not at a location familiar to him when the shooting occurred. The evidence revealed that the location was where the victim was often found. The probative value of the lyrics, which helped to illuminate defendant's motive and intent, were not outweighed by the danger of unfair prejudice to defendant.<sup>74,75</sup>

Giving no consideration to the significant risk of prejudice from rap's negative perception, the court treated bolstered lyrics as literal and matched them with specific facts of the case.<sup>76,77</sup> What's more, even when interpreted literally, the lyrics do not bear a strong factual connection to the case (i.e., connecting "when I come through you[r] hood, you ain't no good" to being in the victim's neighborhood at the time of the shooting).<sup>78</sup> If there is any probative value, it's minimal at best. Thus, because the artistic and expressive value of rap went unrecognized and the lyrics were presumed literal, the scale tipped in favor of probative value.<sup>79</sup> The inevitable result is admitting evidence that merely goes to the defendant's propensity.

Notably, the prosecution offered the rap lyrics as evidence of the defendant's motive and intent. However, without requiring the prosecution to show that the defendant intended the lyrics as a truthful recount of a crime, wrong, or act, offering them as proof of motive or intent provides the defendant with little to no protection.

#### **b. *State v. Skinner***

*State v. Skinner* is one of the most cited and discussed cases concerning the admissibility of rap lyrics against a defendant in a criminal proceeding.<sup>80</sup> Its prominence is well-founded, as its decision extends 404(b)'s safeguards against propensity evidence to rap.<sup>81,82</sup> Reflecting on 404(b)'s purpose of keeping propensity evidence from poisoning the jury, the court here reasoned that analysis under 404(b) is crucial to determining the admissibility of rap lyrics, because not all members of society recognize or understand rap as an artistic expression.<sup>83</sup> Thus, by treating the lyrics as evidence of a bad act or wrong under 404(b), the court was able to

<sup>74</sup> "A 'bar' signifies a portion of the verse or song within a 1, 2, 3, 4, count." Morris Lungu, *This is Why Rap Lyrics Are Called Bars: All You Need to Know*, LYREKA, (Dec. 19, 2020) <https://www.lyreka.com/blog/why-are-rap-lyrics-called-bars>.

<sup>75</sup> *Williams*, 2006 Mich. App. LEXIS 3616, at 3.

<sup>76</sup> *See id.*

<sup>77</sup> Notably, the lyrics, without any evidence of when they were composed, only bear on the disputed issues of motive and intent if one believes the lyrics specifically relate to the defendant's intent and motive on the evening the victim was killed. *See State v. Skinner*, 218 N.J. 496, 95 A.3d 236 (2014).

<sup>78</sup> *See Williams*, 2006 Mich. App. LEXIS 3616, at 3.

<sup>79</sup> *See Williams*, 2006 Mich. App. LEXIS 3616, at 3.

<sup>80</sup> *See generally* Devin Rafus, *Opinion: Rap Lyrics shouldn't be used as crime evidence*, THE ATLANTA JOURNAL-CONSTITUTION, (May 25, 2022) <https://www.ajc.com/opinion/opinion-rap-lyrics-shouldnt-be-used-as-crime-evidence/MUBTCPKF7VH5ZITUEA6TRDMLXA/>.

<sup>81</sup> *See Skinner*, 218 N.J. at 518. The defendant here was charged with attempted murder and the prosecution sought to introduce the defendant's rap lyrics as evidence of motive and intent. *Id.* at 499. In agreement with *Williams*, the court noted that the act of writing rap lyrics is not a crime. *Id.* at 517. However, the court found that 404(b) applies because the offered lyrics are *evidence* of a bad act or wrong. *Id.* at 518.

<sup>82</sup> New Jersey Rules of Evidence 401, 403, and 404 are comparable to their FRE counterparts. *See generally* NJRE 401; NJRE 403; NJRE 404.

<sup>83</sup> *See generally Skinner*, 218 N.J. 496.

properly weigh the danger of unfair prejudice against the probative value of the lyrics.<sup>84</sup> To do so, the court applied the framework outlined in *State v. Cofield*, which was established to “avoid the over-use of extrinsic evidence of other crimes or wrongs.”<sup>85,86</sup>

Notably, the court spent considerable time discussing whether the probative value of the defendant’s rap lyrics is outweighed by their apparent prejudice. The court recognized the defendant’s lyrics as graphically violent and reasoned they could be fairly viewed as “demonstrative of a propensity toward committing, or at the very least glorifying, violence and death.”<sup>87</sup> Importantly, and in stark contrast to the *Williams* court, the court had difficulty identifying any probative value in the lyrics.<sup>88</sup> Instead of combing through the defendant’s lyrics and applying them to the facts of the case, the court emphasized that the defendant’s lyrics are artistic self-expression and, thus, no presumption should be made that just because the defendant wrote about certain topics, he acted in accordance with those topics.<sup>89</sup> Put simply, the court presumed the lyrics as fictional instead of literal.<sup>90</sup>

### c. *Montague v. State*

Although the 2020 decision in *Montague v. State* discusses *Skinner*, it falls short when weighing the probative value of rap lyrics against their apparent prejudice.<sup>91,92</sup> After overcoming the low relevancy threshold, the court bypasses FRE 404 and FRE 801, and considers only FRE 403.

<sup>84</sup> See *Skinner*, 218 N.J. at 518-19.

<sup>85</sup> *State v. Cofield*, 127 N.J. 328, 338, 605 A.2d 230 (1992).

<sup>86</sup> First, the court considered whether the rap lyrics pertain to a material issue in the dispute. *Skinner*, 218 N.J. at 519. The court agreed with the prosecution that the issue of motive was in genuine dispute but found that the lyric’s effect was merely bolstering the prosecution’s motive theory because there was already supporting witness testimony. *Id.* What’s more, the court reasoned that the lyrics bear on the issue of motive only if one believes the lyrics specifically relate to the defendant’s motive on the evening the victim was shot and killed. *Id.* at 520. Second, the court considered whether the rap lyrics are clear and convincing evidence of the other bad-act, and noted that the state presented no evidence that the lyrics were anything but fictional. *Id.* at 521.

<sup>87</sup> *Skinner*, 218 N.J. at 521.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 522.

<sup>90</sup> However, the court noted that the presumption of fiction can be overcome by an “unmistakable factual connection to the charged crime.” See *id.* at 523. To illustrate, the court cited *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006). In *Greene*, the prosecution submitted a seven minute long, homemade video of the defendant rapping about murdering his wife. *Id.* at 86. Filmed days after the murder, the defendant raps, “b---- made me mad, and I had to take her life. My name is Dennis Greene and I ain’t got no f---ing wife”, and goes on to describe how she was killed. *Id.* The court had no trouble identifying probative value in the lyrics/video because there is such a strong nexus to the charged crime. See *id.* 86-87. Obviously, the admissibility of the evidence submitted in *Greene* is in stark contrast to the defendant’s lyrics in *Skinner*, for which there is no proof that they are autobiographical statements of historical fact. *Skinner* 218 N.J. at 521. However, the contrast exemplifies the level of caution necessary to ensure a defendant is not prejudiced by their artistic expression. In other words, to presume rap lyrics are literal, there must be a strong, factual nexus between the lyrics and the alleged crime. Still, any literal interpretation must be weighed against the danger of unfair prejudice.

<sup>91</sup> See *Skinner*, 218 N.J. at 521.

<sup>92</sup> See *Montague v. State*, 471 Md. 657, 243 A.3d 546 (2020). Here, the defendant was charged with murder and the prosecution introduced lyrics as substantive evidence of the defendant’s guilt. *Id.* at 667. The proffered lyrics were from a phone call the defendant made from jail while awaiting trial for this case. *Id.* The defendant asked the individual on the other end of the line to record his rap. *Id.* at 671. The individual responded that the defendant was being recorded on the individual’s Instagram account via the “live” feature. *Id.*

In a brief recount of rap's origins, the court seemingly gives more consideration to the prejudicial nature of rap than the *Williams* court.<sup>93</sup> However, the court describes rap as more than entertainment, by stressing that it influences a large segment of society and reinforces a "street code."<sup>94</sup> Still, the court recognized the risk of the defendant's lyrics becoming merely propensity evidence by noting that rap is inherently prejudicial and that the defendant's lyrics include some thematic elements "native to rap as a genre."<sup>95</sup>

Nevertheless, the court still found the lyrics admissible as direct evidence of the defendant's guilt under FRE 403.<sup>96,97</sup> The court reasoned that the inherent danger of admitting the lyrics as merely propensity evidence decreases as the nexus between the offered lyrics and the facts of the alleged crime grow closer.<sup>98</sup> Thus, by reading fact into fiction, the court conducted an analysis akin to that in *Williams*:

In chronologically recounting the details of Mr. Forrester's murder, Mr. Montague's rap lyrics begin with: "And, if a n--a ever play / Treat his head like a target / You know he's dead today." The first verse is a reference to Mr. Forrester's attempt to "play," or cheat, Mr. Montague by purchasing cocaine using counterfeit money. The next two verses are an acknowledgment that Mr. Montague shot at Mr. Forrester, as if he were "a target," for trying to "play" him during the drug transaction. Shortly after Mr. Forrester "played" Mr. Montague, he was shot to death—just as the lyrics recount.<sup>99</sup>

The decision in *Montague* sets a dangerous precedent because it does not adequately consider the negative perception surrounding rap and the danger of that perception unduly influencing the jury.<sup>100</sup> Importantly, the decision showcases how rap, as a genre, is often misunderstood and connoted as a negative influence.

#### IV. Dissecting H.R. 8531: Why it Won't Work with Rap

<sup>93</sup> See *Montague*, 471 Md. at 665.

<sup>94</sup> *Id.* at 666. "A characteristic of 'street code' is that the use of violence is central to retaining respect and enforcing social norms." *Id.*

<sup>95</sup> *Id.* at 692.

<sup>96</sup> *Id.*

<sup>97</sup> Maryland Rules of Evidence 401, 403, 404, are comparable to their FRE counterparts. See generally MRE 401; MRE 403; MRE 404.

<sup>98</sup> *Id.* ("Although rap lyric evidence carries inherent prejudicial effect, the probative value of a defendant's rap lyrics shares an inverse relationship with unfair prejudice.").

<sup>99</sup> *Id.* Although this interpretation offers little probative value, if any, the court nevertheless concluded that the probative value of the lyrics outweighs any potential prejudice because of one additional verse: "and if you ever play with me, I'll give you a dream, a couple shots snitch." *Id.* at 694. The court found the generic stop snitching reference adds probative value because it was posted on social media a few weeks before trial. *Id.* at 690.

<sup>100</sup> In contrast to *Skinner*, the court here did not consider any factors to mitigate the possibility of introducing propensity evidence. See generally *Montague*, 471 Md. 657; but see *Skinner*, 218 N.J. 496.

The 2022 Restore Artistic Expression Act (“RAP Act”) is undoubtably a significant step towards ensuring rap artists retain their freedom of artistic expression.<sup>101,102</sup> Ultimately, however, the proposed rule will not provide rap artists the same level of protection as other artists. As is, the framework of the rule does not completely limit the possibility of rap lyrics coming in as character evidence, because the rule does not ensure that the probative value of the lyrics will be weighed fairly against their prejudicial nature. The risk of prejudicial harm is amplified when the defendant’s rap lyrics are offered to prove a conspiracy charge. Thus, to ensure rap lyrics are treated the same as other artistic expressions under the proposed rule, the rule must classify artistic expressions as character evidence at the outset.

To illustrate, applying proposed FRE 416, as is, to the facts in *Montague* and *Williams* does not change the outcomes in either case.<sup>103,104</sup> In both cases, the proffered lyrics were composed by the defendant, making the lyrics original expressions for the purpose of 416 (1)(A).<sup>105</sup> 416(1)(A) requires showing that the defendant intended to adopt the literal meaning of the expression.<sup>106</sup> Although this provision seemingly places an additional burden on the prosecutor, it is unlikely to afford criminal defendants, in this context, any additional protection from prejudicial admission of their lyrics.

More specifically, proof of the defendants’ intent will likely rely on the same facts used to prove 416 (1)(B) and (1)(C), that the artistic expression references specific facts of the crime and is relevant to an issue of fact that is disputed.<sup>107</sup> For example, in *Montague*, the court found the fact that the lyrics were composed *after* the crime probative, only because the lyrics, in the court’s opinion, referenced specific facts of the crime.<sup>108</sup> Arguably, this fact also proves the defendant intended the lyrics as literal, because they “recount” the specifics of the crime. The court in *Williams* also focused on a temporal aspect, treating the lyrics as a preview to the alleged crime and finding the lyrics specific enough that they foreshadow the defendant’s motive and

<sup>101</sup> The RAP Act deems creative and artistic expressions inadmissible unless the government can prove four elements by clear and convincing evidence: (1)(A) if the expression is original, that the defendant intended a literal meaning, rather than figurative or fictional meaning, or (B) if the expression is derivative, that the defendant intended to adopt the literal meaning of the expression as the defendant’s own thought or statement, (2) that the creative expression refers to the specific facts of the crime alleged, (3) that the expression is relevant to an issue of fact that is disputed, and (4) that the expression has distinct probative value not provided by other admissible evidence. Restoring Artistic Protection Act of 2022, H.R. 8531, 117th Cong. § 2(a) (2022).

<sup>102</sup> If a defendant’s artistic expression is admitted, the rule still seeks to limit the possibility of unfair prejudice by requiring that the jury receive limiting instructions and a redacted version of the expression that includes only what was admitted under the exception. *Id.*

<sup>103</sup> Recall in both cases, 404(b)’s safeguards were not applied, thus, the danger of unfair prejudice from admitting the lyrics was not adequately weighed against their probative value, even though both courts considered rule 403. *See Williams*, 2006 Mich. App. LEXIS 3616; *see also Montague*, 471 Md. 657.

<sup>104</sup> The analysis determining probative value is extremely similar in both cases, with the court presuming the lyrics are literal and reading fact into fiction. In the end, any (minimal) probative value found was not substantially outweighed by the danger of unfair prejudice, because the danger of unfair prejudice from admitting rap lyrics went unrecognized in the first place. *See Williams*, 2006 Mich. App. LEXIS 3616. *See also Montague*, 471 Md. 657. *But see Skinner*, 218 N.J. 496.

<sup>105</sup> H.R. 8531, *supra* note 85.

<sup>106</sup> H.R. 8531, *supra* note 85.

<sup>107</sup> *See* H.R. 8531, *supra* note 85. Proof of the defendant’s intent regarding the lyrics will likely rely on the same facts used to prove the second and third elements, that the lyrics refer to specific facts of the case and are relevant to an issue of fact in dispute.

<sup>108</sup> *Montague*, 471 Md. at 692.

intent in committing the murder.<sup>109</sup> One could also argue that because the lyrics were composed before the crime and make specific references to facts of the crime, the defendant must have intended a literal meaning.

Lastly, the fourth element incorporates a valuable protection from *Skinner*, requiring the expression to have distinct probative value not provided by other evidence.<sup>110</sup> However, even if distinctly probative, rap lyrics must be carefully weighed against their inherent danger of unfair prejudice. For example, in *Montague*, the court recognized the defendant's "generic stop-snitching reference" as common to rap and prejudicial if offered as evidence, but also found that the reference made it more probable that the defendant committed the alleged murder because it was posted not long before trial.<sup>111</sup> Although the lyrics, arguably, have distinct probative value, it should not be presumed that just because the defendant wrote about certain topics, he acted in accordance with those topics.

Even though a court would likely consider FRE 403 after an analysis under FRE 416, this is not an adequate safeguard against unfair prejudice in the context of rap lyrics as criminal evidence. The courts in *Williams* and *Montague* both considered FRE 403, but without treating rap lyrics as character evidence subject to FRE 404, the court was unable to fairly balance the danger of unfair prejudice against the lyric's probative value. Had either court first categorized rap lyrics as character evidence by recognizing that rap lyrics can be fairly viewed as demonstrative of a propensity toward committing violence or criminal activity, like the *Skinner* court, it is less likely that the lyrics would have been construed so literally. In other words, because rap, as an art form, is often misunderstood and corroded by bias, it is likely that any analysis regarding the admissibility of rap lyrics will still be unfair under FRE 416.

The risk of rap lyrics being offered as merely evidence of the defendant's bad character or propensity to commit a crime is compounded when the defendant is charged with conspiracy, because of the broad nature of conspiracy laws and the often violent, graphic, and exaggerated nature of rap music.<sup>112,113</sup> Given that conspiracy charges do not require proof of actual criminal activity, connecting rap lyrics to "specific" facts and intent in a conspiracy is a relatively easy feat under the proposed FRE 416.<sup>114</sup>

## V. Solution

### a. Incorporating FRE 404

This Article proposes that FRE 416 require an analysis under FRE 404. Specifically, the rule must be clear that an artistic expression is character evidence that merely shows conduct in conformity, unless offered for a use permitted under FRE 404(b) and subject to 416(1)(A)-(4).

<sup>109</sup> *Williams*, 2006 Mich. App. LEXIS 3616 at 3.

<sup>110</sup> *See Skinner*, 218 N.J. 496.

<sup>111</sup> *See Montague*, 471 Md. at 692.

<sup>112</sup> *See generally* John A. Regan, *RICO 101*, PROSECUTING ATTORNEY'S COUNSEL OF GEORGIA, (2015) <https://pacga.org/wp-content/uploads/2021/02/RICO-101.pdf> (last visited Dec. 30, 2022).

<sup>113</sup> *Id.* For instance, the courts in *Montague* and *Williams* still found the offered "generic" rap lyrics to be factually tied to the alleged murder charges. *Montague*, 471 Md. at 692; *Williams*, 2006 Mich. App. LEXIS 3616 at 3. Notably, the court in *Williams* found the defendant's vague rhyme "when I come through your hood, you ain't no good" as a specific reference to the defendant being in the victim's neighborhood at the time of the murder. *Williams*, 2006 Mich. App. LEXIS 3616 at 3.

<sup>114</sup> *See Regan, supra* note 91.

Requiring the court to view rap lyrics as character evidence will have a two-pronged effect: lyrics will be presumed fictional instead of literal and appropriate weight will be given to their prejudicial nature. Requiring courts to presume that a defendant's artistic expression, no matter the topic, is not evidence that the defendant acted in accordance with that expression, will help courts consider the substantial risk of the jury being unduly influenced by the negative perceptions and biases surrounding rap. Then, when combined and proved by clear and convincing evidence, FRE 416(1)(A)-(4) becomes a shield, protecting rappers' art from use as prejudicial evidence.<sup>115</sup>

### b. Ensuring Rap is Uninhibited

As hip-hop approaches its golden birthday, it remains a powerful medium for social and political expression.<sup>116</sup> Historically, the braggadocious persona personified in rap was a shield, a "psychic armor," for dealing with the harsh realities of systematic oppression.<sup>117</sup> When hip-hop became a commercial success in the late 80s, only the toughest personas would rise to fame, often at the hands of those with little understanding of rap's culture.<sup>118</sup> Today, as the most popular genre in the country, rap continues to offer tremendous financial and cultural opportunities, but the same lack of understanding lends to the perpetuation of rap's negative stereotypes.<sup>119</sup> Thus, legislators must consider the danger of rap on trial manifesting as censorship.

## VI. Conclusion

Rappers are well aware of the risk that their creative expressions may be used against them in a courtroom.<sup>120,121</sup> Ensuring rappers remain uninhibited and retain their freedom of artistic expression requires limiting the opportunities for rap to be exploited by prosecutors. Thus, FRE 416 must incorporate FRE 404(b) to properly limit uses of artistic expression as

<sup>115</sup> See *id.* See generally *State v. Cofield*, 127 N.J. 328, 338, 605 A.2d 230 (1992).

<sup>116</sup> In the 1970s, rap gave a voice to the marginalized, allowing them to artistically demonstrate their frustration with social and political issues like poverty, oppression, drugs, and violence by providing an outlet to feel free and uninhibited, and exercise creativity. *Hip-Hop: Beyond Beats & Rhymes*, MEDIA EDUCATION FOUNDATION, <https://www.mediaed.org/transcripts/Hip-Hop-Transcript.pdf> (last visited Dec. 30, 2022), at 1-6.

<sup>117</sup> *Hip-Hop: Beyond Beats & Rhymes supra*, note 98 at 5.

<sup>118</sup> Nadia Angel, *The Commercialisation of Rap*, REBEL, (March 13, 2020) <https://www.rebelessex.com/2020/03/the-commercialisation-of-rap/>

<sup>119</sup> *Id.* See also *Hip-Hop: Beyond Beats & Rhymes supra*, note 98 at 1 ("Yo, I'm this, I'm that, I'm totin' it. You know you ain't doing jack s—t. But at the end of the day, you know you could make somebody believe that you are, it can be profitable." (Busta Rhymes describing the misguided relationship many rappers have with rap.)).

<sup>120</sup> In 2016, up-and-coming rapper Drakeo was charged with murder and attempted murder after attending a party where an altercation broke out that turned into a shooting. Sam Levin, *The jailed LA rapper whose songs were used to prosecute him*, THE GUARDIAN, (Oct. 2, 2019) <https://www.theguardian.com/us-news/2019/oct/01/drakeo-the-ruler-los-angeles-rapper-songs>. Citing one lyric, "chopper makes you go ugh," the detective told Drakeo the district attorney could prosecute him by playing that line repeatedly. *Id.* However, the jury acquitted Drakeo of all murder charges and found him guilty of one charge for unlawful possession of a firearm. *Id.*

<sup>121</sup> Despite the recent passing of New York's "Rap Music on Trial" bill, in July 2022 Bobby Shmurda cautioned rappers to remain "mindful" of their lyrical content. Joe Pierce, *Bobby Shmurda Cautions Rappers to Be 'Mindful' of Their Lyrics Despite Passing of 'Rap Music on Trial' Bill*, COMPLEX (July 11, 2022) <https://www.complex.com/music/bobby-shmurda-cautions-rappers-to-be-mindful-of-lyrics>.

criminal evidence, by ensuring the significant risk of unfair prejudice from putting rap on trial is adequately weighed against its probative value.

If not, when “rap can be used against you, it limits your art ... sometimes people just wanna be free.”<sup>122</sup>

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<sup>122</sup> *Id.*